

The History (and Future?) of e-Trespass

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Introduction

- Where would e-trespass arise
- What are Bots and Spiders
- Are they all bad?
- Other remedies?
 - Conversion
 - Unfair Competition
 - Infringement?
 - Computer Fraud and Abuse Act



Why The Need

- Existing protection insufficient?
 - Copyright protection of databases limited
 - No protection for facts or compilations of factual material arranged “logically”
 - No protection where even a substantial portion of pure data was copied
 - Subject to copyright misuse defense
- Spam Cases – No other remedy available



Thrifty-Tel, Inc. v. Bezenek

46 Cal. App. 4th 1559 (1996)

- The analytical starting point
- Use of auto dialer computer program in attempt to locate authorization codes
 - 7 hour call overburdened system and denied users access
- Trespass to Chattel – intentional interference with the possession of personal property proximately causes injury



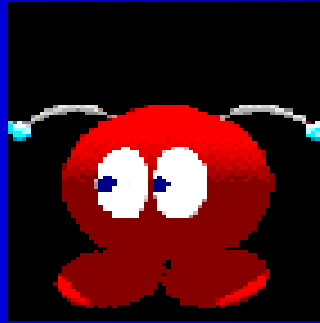
You've Got Mail...And Then Some

- Application of Trespass to spam cases
 - CompuServe v. Cyber Promotions, 962 F.Supp 1015 (S.D. Ohio 1997)
 - Spam violated terms of use policy through which users were granted consent to send e-mail to CompuServe computer system. Violation of policy = use of system outside of scope of consent = trespass
 - AOL v. IMS, 24 F.Supp 2d 548 (E.D. Vir. 1998)
 - Hotmail Corp. v Van Money Pie, Inc., 47 USPQ 2d 1020 (N.D. Cal 1998)
 - AOL v. LCGM, Inc., 49 F.Supp 2d 851 (E.D. Vir. 1999)

You've Got Mail...And Then Some

- By the close of the century, case law established the principal that sending a large amount of unsolicited commercial e-mail to a computer network in violation of its terms of service constituted a trespass to the server (the chattel) and could be enjoined





eBay v. Bidder's Edge

100 F.Supp.2d 1058 (N.D. Cal. 2000)

- Aggregation of Factual Information
 - No bots per terms of service
 - 100,000 bot visits per day, accounting for 1.53% of all requests and 1.10% of total data transferred by eBay.
- Injunction granted
 - Intentional interfering with eBay's possessory interest in system, and
 - Proximately caused damages by diminishing condition, quality or value of personal property (by affecting capacity of servers)



Ticketmaster Corp. v. Tickets.com, Inc

- trespass claim dismissed
 - “it is hard to see how entering a publicly available website could be called trespass everyone is invited to enter”
 - Evidence failed to present “physical harm to the chattel” or “some obstruction of its basic function”
 - Judge Hupp’s decision influenced by copyrightability of data copied by Tickets.com



Register.com v. Verio

126 F.Supp.2d 238 (S.D.N.Y. 2000)

- Use of bots to obtain data from whois database for marketing purposes
- Although obligated to make information available to public, restrictions on subsequent of information through terms of use were valid
 - No click through...no problem
- Trespass upheld because:
 - strain on Register.com's resources could cause the system to malfunction or crash
 - Risk of others engaging in similar conduct

Register.com v. Verio

126 F.Supp.2d 238 (S.D.N.Y. 2000)

- Injunction upheld on other grounds
 - Breach of contract claim (violation of terms of use for whois database)
 - Computer Fraud and Abuse Act (18 U.S.C. §1030)
 - Use of whois data for direct marketing actionable under §1030(a)(2)(C) which prohibits a person from intentionally accessing a computer w/o authorization and obtaining info.
 - General bot harm (diminished capacity, etc) actionable under §1030(a)(5)(C) which prohibits unauthorized access which causes damage
 - §1030(e)(8) \$5,000 aggregate loss requirement satisfied due to risk of harm if conduct not restrained

Intel Corp. v. Hamidi

94 Cal.App.4th 325 (2001)

- Hamidi sent 6 mailings to between 8,000 and 35,000 Intel employees
 - “opt-out” provided – only 450 opted out
 - Intel Requested Hamidi to stop
 - Hamidi apparently evaded technical measures
 - Intel employees spent “significant” time to block and remove Hamidi’s e-mail



Intel Corp. v. Hamidi

The Majority

- Trespass to chattel actionable per-se without proof of actual damages
- Disrupted business by using property; loss of productivity of from looking at Hamidi e-mail; time spent by security department

Dissenting & Amicus

- Trespass claim requires proof of damage to chattel or interference with possessory interest
- Past cases have shown burden on Plaintiff's system and a reduction in system capacity and slower performance



Where is it going?

System
Impairment?

No opt
out =
invitee?

Measure of
harm?

Just One
e-mail

No
negative
affect to
value

Subject of
a ©

Possessory
interference
vs
intermeddling
vs. substantial
interference

First
Amendment

